Supreme Court, U.S.
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No. 04-1207

In the
Supreme Court of the United States

SHELDA HARRIS BANNON,
as parent and natural guardian of her daughters
Sharah Harris and Brittni Harris,
Petitioner,

v.

SCHOOL DISTRICT OF PALM BEACH COUNTY,
a body corporate, and ED HARRIS, individually
and in his capacity as principal of
Boca Raton Community High School,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As shown in this brief, the Court should deny the Petition as to all questions presented. Respondents additionally object to the content of Petitioner's questions because they impliedly mischaracterize the Eleventh Circuit's holding and they ignore important facts. Respondents submit the following replacement question, including relevant unique facts:

Did the Eleventh Circuit correctly decide that the Constitution, as interpreted in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permits a public high school principal to restore order to the school's disrupted learning environment by requiring minor edits to religious speech that a student had painted on large murals (upon semi-permanent construction-barrier panels owned by the school) near the main office and other high-traffic walkways for constant viewing by a captive audience of students for up to four years during reconstruction (as part of a school-sponsored beautification project coordinated by the student government/leadership class, approved by school administration, advertised by the school, regulated by the principal, and supervised by a teacher), when the religious speech was suggested or encouraged by two faculty members to be included without advance notice to the principal or supervising teacher, and these murals became the only ones to include verbal messages, when the project was intended for decoration rather than a forum for viewpoints; and disruption arose due to Establishment Clause concerns about the proselytizing sectarian religious speech bearing the imprimatur of the school?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, School District of Palm Beach County, Florida, and Ed Harris, request that the Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on October 12, 2004.

FACTUAL BACKGROUND

Respondents object to Petitioner's statement of the case, as it ignores details that militate against Petitioner's claim that principal Ed Harris—who in his private life was a Christian lay minister and Sunday School teacher (PD 95)[1]—censored school-sponsored proselytizing Christian messages based on his alleged "individual . . . disapprov[al]" of their Christian point of view. Pet. 13. In scholastic First Amendment cases the "hard task of judging . . . requires courts to draw lines, sometimes quite fine, based on the *particular facts of each case.*" *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (emphasis added). The details are set forth here, consistent with the statements of facts in the opinions below:

Disruption. — The principal of Boca Raton Community High School in Palm Beach County, Florida, encountered disruption on his campus on the morning of February 11, 2002. First he noticed a commotion involved several students and teachers in a walkway. Additionally, many phone calls were coming in to the principal. The source of the disruption was featured on the news that morning, with three television stations and the

[1] The notation "PD" refers to the principal's deposition in the record on file with the Eleventh Circuit.

newspaper having sent reporters. (PD 80, 81, 97.) The disruption took time away from "the productivity of the school in itself and the . . . principal's time, the assistant principal's time[, and] the student's time away [from] the main focus of the school . . . ." (PD 83.) There was much student discussion about the source of the commotion; it was distracting to the students and to the school's mission of educating the students. (PD 97–98.) Principal Harris heard rumors of other concerns from the students, faculty, and the public, and he took all of the debate as an indication that there was a controversy that would be disruptive to the school. (PD 48, 49, 51, 52, 83.)

Source of the Disruption. — There was substantial concern about an apparent Establishment Clause violation through bold proselytizing sectarian messages that had been painted over the weekend on several construction-divider panels in prominent locations near the main office and other high-traffic areas of the school.

The school was undergoing a long-term reconstruction project, and the contractors had erected about sixty (60) 4-foot by 8-foot flat-white plywood construction-divider panels in interior and exterior walkways throughout the school. (PD 31, 39; SD Ex. 2.)[2] Feeling that some colorful paintings would make the school more aesthetically pleasing, (PD 31), the student government/leadership class sponsored a beautification project, inviting students and teachers to paint 8-foot by 8-foot murals (each mural occupying two of the construction panels owned by the school), and the project was also a school fundraiser. (PD 40.) Petitioner described student government as a leadership class that students join by going "to the guidance counselor and ask[ing] for the class." (SD 9.)

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[2] The notation "SD" refers to Sharah Harris' deposition in the record on file with the Eleventh Circuit, and "Ex. 2" refers to Exhibit 2 of that deposition.

To seek approval of the project concept, the teacher/class sponsor Ms. Roberts first discussed it with Principal Harris, who advised that the school must "be careful what we do on the walls, because . . . you can't offend people by putting things on the wall" with anything "like gang-related information," or "discriminating against someone." (PD 31, 33, 41.) Ms. Roberts submitted an activities pre-approval form, which was approved by an assistant principal and Mr. Harris, and it was Ms. Roberts' responsibility to have the appropriate-content guidelines announced to the students. (PD 31–32; SD 7.)

Petitioner saw school announcements about the beautification project, inviting any student to assist the leadership class in painting the panels. (SD 6.) She was a member of the Fellowship of Christian Athletes ("FCA"), a student-initiated club that met before school once a week. (SD 10, 62.) Petitioner apparently invited fellow FCA members to participate with her. Petitioner personally painted two of the murals on a Saturday, February 9, 2002, and some other FCA members painted also. (SD 29, 41–48.) The panels themselves remained school property, under the ownership and dominion of the school before, during, and after the painting. (SD 108, 112.)

The beautification project was simply intended to supply artwork to decorate the plain white plywood panels. (PD 31.) But unlike other students' paintings, the murals painted by Petitioner[3] included verbal messages. (SD 78.) Petitioner conceded that her murals reflected more than artwork; they also exhibited a religious verbal message. (SD 139.) The FCA had devised this plan without notifying the administration. (SD 17–23.)

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[3] For convenience, the term "Petitioner" in this brief is used to refer to Sharah Harris (on whose behalf her mother Shelda Harris Bannon sued) and, unless the context requires otherwise, the term also encompasses some murals painted by other FCA members who joined or assisted Sharah in painting religious messages.

Suggested and Encouraged by Faculty Members. — Although the Petition characterizes the religious messages as student-initiated expression, such claim is vitiated by the fact that two faculty members had been involved with the selection of the religious messages; the FCA faculty sponsors had discussed the religious-message plans with Petitioner, and later the plan was presented to the FCA club, (SD 56), where one of the faculty sponsors encouraged them to carry out the plan with the intent of painting the religious messages on several murals in different areas in order to "have them all the way around the school." (SD 14, 17, 21.)

Further, Petitioner selected some of the messages from a document received from a faculty member at school. (SD 49–54.) A faculty member handed the list of suggested religious messages to Petitioner in the school hallway, suggesting she might find some of them useful for her mural. (SD 54.) The messages on the list named God, and Petitioner also added a suggestion using the name "Jesus." (SD 59.) The other FCA sponsor knew exactly what Petitioner was planning to paint and encouraged her to do so. (SD 17.)

Proselytizing Sectarian Messages. — Petitioner's first mural stated, "Because He loved, He Gave," paraphrasing John 3:16. The background had a cross in the middle, and the word "loved" was represented by a heart plus the letters "-ed." (SD 30.) Petitioner's second painting boldly proclaimed, "Jesus has time for you; do you have time for Him?" (SD 31.) Paintings by other FCA members (also referred to here as Petitioner's murals) included overt religious messages such as "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God," selected from the Petitioner's list. (SD 42–44.) In all, Petitioner's large murals used about eight instances of the word "God;" one instance of the name "Jesus," and three crosses, (SD 114); but none of the other murals in the project used any verbal messages.

Immediate Establishment Clause Concerns. — Ms. Roberts, the teacher who supervised the mural painting project, immediately became concerned about the appropriateness of Petitioner's unexpected content, apparently because of Establishment Clause concerns about the proselytizing religious messages, Pet. App. A-27, and she reported the issue to the principal that evening. (PD [illegible]–45.) Ms. Roberts felt that an FCA faculty sponsor had "sort of pushed the issue" of including religious messages on the murals. (PD 88.) In response, the principal suggested that they review the appropriateness of the murals together on Monday (the next school day). (PD 45.) That is when the principal discovered the disruption.

Effects of Disruption. — With all the controversy and commotion, less academic work got done that day than usual. (PD 85.) For example, in Petitioner's third-period math class, a substantial discussion ensued. "[I]t took a few [minutes] — 'cause some like wanted to say what they believe, and then a few other [students] wanted to say what they believed, and then [it] just kind of went on from there." When students posed questions to the teacher, "maybe he would try to answer it, and then he would come back to me . . . and have me answer it," Petitioner revealed. (SD 88–90.)

The principal recalled, "Every time I walked down the halls I had kids and teachers and all [saying], 'What's going on here,' you know. . . . It was related to the panels . . . ." (PD 96.) The principal clearly was concerned about the order and educational mission of the school if he had allowed the murals to remain unedited. He did not mind the messages personally, but "when it affects the entire school, . . . the institution that I am working in and have a responsibility for, I must uphold the rights of that institution" to a conducive learning environment. (PD 99.)

After a morning of commotion, the principal finally visited the student's fourth (last) period class to confer

discreetly with the teacher, Ms. Roberts, who had supervised the painting project. Although Principal Harris—as a devout Christian—had no personal distaste for the sectarian proselytizing religious messages, he was concerned about an apparent Establishment Clause violation; he mentioned to Ms. Roberts the requirement of "separation of church and school" (PD 68) and left it up to Ms. Roberts, as the project sponsor, to determine precisely which parts should be painted over. (PD 56–57.)

Reasonable, Least-Restrictive Editorial Control. — After Mr. Harris left, Ms. Roberts asked Petitioner to step outside for a moment, where Ms. Roberts explained the need to paint over the overt religious words and sectarian symbol ("Jesus," "God," and the cross) because of Establishment Clause concerns; but the remainder of the mural content (non-sectarian, non-proselytizing portions and pictures) was appropriately allowed to remain. (SD 92–93.) Ms. Roberts suggested reasonable, minor alterations to Petitioner, such as altering "Jesus has time for you; do you have time for Him" to the non-sectarian, "He has time for you; do you have time for Him." (SD 93.)

Petitioner performed the re-painting after school. (SD 129.) The re-painting apparently involved mostly other FCA-member students' murals; Petitioner was asked to do the repainting on them because she had been the FCA painting coordinator. (SD 41–48; 131.) (Notably, the principal had also directed the removal of several gang symbols, some satanic symbols, and some after-added profanity that had been painted on murals, (PD 47).) Although Petitioner was initially upset about having to modify a few portions of the murals, she admitted she was glad the principal had directed other students' satanic symbols to be removed, and she would be in favor of removing anything like drug-related speech, hate symbols, and gang symbols. (SD 80, 101.) Petitioner conceded the principal had no invidious motive in removing any of the religious expression. (SD 101–104.)

Before the summary judgment hearing in the district court, Petitioner had already graduated from high school and her claims for injunctive and declaratory relief were moot. The parties stipulated at the hearing that her remaining claims were limited to money damages under 42 U.S.C. § 1983. Pet. App. A-28 n. 10. The district court granted summary judgment for Respondents, finding that *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988) allows schools to exercise editorial control over school-sponsored religious speech, with the "legitimate goal of preventing disruptive religious debate in the school corridors" and disassociating the school from a position other than neutrality on matters of religion. (Pet. App. A-31, 32.)

The Eleventh Circuit affirmed, finding the murals were curricular school-sponsored speech bearing the imprimatur of the school, over which substantial viewpoint-neutral content-based editorial control is allowed when reasonably related to legitimate pedagogical concerns under *Hazelwood*. The court recognized one of the legitimate pedagogical concerns was ending "the disruption to the school's learning environment caused by [Petitioner's] murals," and the editorial control was reasonably related to that goal "because it ended the disruption." *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1217 (11th Cir. 2004).

REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN *HAZELWOOD*

Contradicting the courts below, Petitioner asserts that the beautification project was not school-sponsored speech under *Hazelwood School District v. Kuhlmeier*, 484

U.S. 260, 271 (1988). This assertion rests upon three erroneous arguments: 1) that the project was a public forum for unfettered expression of viewpoints; 2) that the *Tinker* disruption/interference standard should apply; and 3) that the beautification project was not "curricular." However, *Hazelwood* is the correct standard.

A. The Project Was a Scholastic Nonpublic Forum

The Eleventh Circuit analyzed the three kinds of government property and systematically rejected two of the three possibilities for the school's mural project: schools do not possess the qualities of traditional public fora; and the school had not intentionally opened a designated or limited public forum for indiscriminate discourse. *Bannon*, 387 F.3d at 1212–13, citing *Hazelwood*, 484 U.S. at 267, 270. The forum was therefore a nonpublic forum, consistent with the general rule that schools are nonpublic fora unless they have intentionally designated a public forum. *See, e.g., Grattan v. Bd. of Sch. Com'rs of Baltimore City*, 805 F.2d 1160, 1162–63 (4th Cir. 1986) (even a public school parking lot, after hours, is a nonpublic forum in which schools can regulate content).

The courts have interpreted *Hazelwood* as "constrain[ing] the [forum] analysis by requiring that courts focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1991) (citing *Hazelwood*, 484 U.S. at 270–73). The analysis must consider the school's "pedagogical concerns, such as . . . *disassociating itself from speech* inconsistent with its educational mission and *avoiding the appearance of endorsing views*, no matter who the speaker is." *Planned Parenthood*, 941 F.2d at 827 (emphasis added).

Nonpublic fora are not transformed into limited public fora when expressive activity simply happens to occur therein. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 805 (1985). Nor do school-sponsored projects become limited public fora simply "by permitting limited discourse, but only by *intentionally* opening a nonpublic forum for public discourse." *Hazelwood*, 484 U.S. at 267 (emphasis added).

Here, the school's mural project—planned by the student government/leadership class, approved and regulated by principal, advertised by the school, and supervised by a teacher—was intended to benefit the school by raising funds and making the construction panels bearable. There was no "clear intent to create a [limited] public forum" by "open[ing] the [panels] . . . to indiscriminate use . . . by the student body. . . . Instead, they reserved the [nonpublic] forum for its intended purpose" by seeking colorful art, by providing guidelines, and by supervising the project. *See Hazelwood*, 484 U.S. at 270 (citations and internal quotations omitted). As the *Bannon* court pointed out, the principal had never "said the murals were a forum for expressing [students'] political or religious views." 387 F.3d at 1213. Out of the many murals in the project, only Petitioner's used the opportunity to proclaim verbal messages. Such incidental expression did not transform the school-sponsored art project into a limited public forum. *Cf. Cornelius*, 473 U.S. at 805. The school's beautification project remained a scholastic nonpublic forum.

Of the several kinds of expression that may occur in a scholastic nonpublic forum, it is important to distinguish between two kinds for this case: school-sponsored speech versus pure student expression. Petitioner argues that the pure-student-expression standard should apply under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court, however, has explained the difference:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech [the *Hazelwood* school-sponsored speech standard]. The former question [in *Tinker*] addresses educators' ability to silence a student's *personal expression that happens to occur on the school premises* [and may cause disruption, interference, or disorder]. The latter question [in *Hazelwood*] concerns educators' authority over school-sponsored publications, theatrical productions, and *other expressive activities* that *students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.*

Hazelwood, 484 U.S. at 270–71 (emphasis added).

Here, the school-sponsored mural project plainly was not merely personal, private expression that just happened to occur on campus like a slogan on a student's shirt or a conversation between two students over lunch, subject to the *Tinker* standards. Rather, the school had organized, regulated, and supervised the project resulting in murals that would be part of the school for years.

B. The Murals Were School-Sponsored Speech Bearing the Imprimatur of the School

In spite of causing disruption like that which can be quelled even under the heightened *Tinker* standard as discussed in Part III.A below, the murals actually fit squarely within the *Hazelwood* framework of school-sponsored speech bearing the imprimatur of the school.

> [T]here is *no question* students, parents, and other members of the public might reasonably believe [Petitioner's] murals bear the imprimatur of the school. The murals appear in prominent locations in the school . . . [and] a reasonable observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the [murals] it allowed to become a part of the school itself. . . .

Bannon, 387 F.3d at 1214 (citation and internal quotes omitted).

C. The Mural Project Was a Curricular Activity

As relates to the curricular application of *Hazelwood*, two interpretations would appear valid: either school-sponsored speech includes any expression implicating pedagogical concerns and bearing the imprimatur of the school, or the term refers to a broadly-defined gamut of curricular activities.

The Tenth Circuit has held that "'school-sponsored' speech . . . mean[s] [any] activities that might reasonably be perceived to bear the imprimatur of the school and that involve *pedagogical concerns*." *Fleming*, 298 F.3d at 924. *Hazelwood* spoke of activities that "may fairly be characterized as part of the school curriculum." 484 U.S. at 271. *Hazelwood* emphasizes controlling "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" or other "vehicle of student expression," so that "views of the individual speaker are not erroneously attributed to the school." 484 U.S. at 271, 273. "Further, the *environment* in which learning takes place, such as the school's *hallways*, can be a pedagogical concern, as it affects the learning process." *Fleming*, 298 F.3d at 931

(emphasis added). The Tenth Circuit interprets *Hazelwood's* curricular language ("designed to impart particular knowledge or skills to student participants and audiences") to mean any "activities that affect learning, or in other words, affect pedagogical concerns," such as "the school district's desire to *avoid controversy within a school environment*." *Id.* 298 F.3d at 925–26 (emphasis added; citations omitted).

The Eleventh Circuit has taken a conservative approach, holding that school-sponsored speech refers to curricular activities, which are to be broadly defined. *Bannon*, 387 F.3d at 1214. Under either approach, the results are generally the same: the activity in question will often be subject to control under *Hazelwood*, regardless of whether it occurs in a classroom. Having taken the conservative view, the *Bannon* court explained:

> To be considered curricular, expressive activities need not occur in a "traditional classroom setting." *Hazelwood*, 484 U.S. at 271. Instead, expressive activities are curricular so long as they are merely (1) "supervised by faculty members," and (2) "designed to impart particular knowledge or skills to student participants and audiences." *Id.* In contrast to Appellant's position, *Hazelwood* never defined curricular activity in terms of whether student participation was required, earned grades or credit, occurred during regular school hours, or did not require a fee.

Bannon, 387 F.3d at 1214. Petitioner's expression certainly occurred in the context of a curricular activity:

> The first prong is met because Principal Harris and Ms. Roberts were faculty members who supervised the beautification project. Likewise, the second prong is

> satisfied because the beautification project was designed to impart particular knowledge and *skills* to student participants and audiences; it allowed student participants to express themselves *artistically* [similar to skills in art classes], allowed student audiences to *appreciate their fellow students' artwork*, and *promoted school spirit*, among other things.

Bannon, 387 F.3d at 1214–15 (emphasis added).

Additionally, the mural project was initiated and coordinated by a class (the student government/leadership class) and directly affected the learning environment. This project was one of *Hazelwood's "other expressive activities* that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *See* 484 U.S. at 271. It certainly was not merely extracurricular speech like discourse at a baseball game. Yet, *Hazelwood* has even been applied to a ball field fence. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000). *Hazelwood* plainly said such activities need not occur in a classroom setting. 484 U.S. at 271. There can be no doubt that "curricular activities" must be construed broadly under *Hazelwood*.

D. *Bannon* Is Consistent with the Viewpoint Doctrines of *Lamb's Chapel*, *Good News Club*, and *Rosenberger*

Contrary to Petitioner's claim that the Eleventh Circuit "did not even consider" *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), that decision was discussed in the district court's opinion and was briefed for the Eleventh Circuit by both parties. In both *Good News Club* and *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), the schools had

intentionally opened a limited public forum for temporary, after-school private use of meeting facilities by outside groups or extracurricular student clubs, which were not initated or coordinated by the school. In contrast to the private, temporary, extracurricular, after-school use of meeting facilities in *Good News Club*, the murals in *Bannon* were school-sponsored and became a semi-permanent part of the fabric of the building, to be seen daily by a captive audience during school hours. The Good News Club sought "to address *a subject otherwise permitted* under the rule, the teaching of morals and character, *from a religious standpoint*." 533 U.S. at 109. By contrast, the school in *Bannon* did not open a public forum for any viewpoints and had not made any topics includable; the project was for aesthetic beautification.

Bannon is also fully consistent with *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), which involved a "limited public forum . . . of [the university's] own creation," *id.* at 829, in which the university expressly solicited the views of a diversity of students in an extracurricular program that was separate and independent from the university, *id.* at 824, "to encourage a diversity of views from private speakers." *Id.* at 834. The university had intended to "open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity . . . of student life," *id.* at 840. Thus, the University's extracurricular student activity fund should have provided newspaper printing funds from the extracurricular student activity-fees fund on a "religion-blind basis." *Id.* at 845. By contrast, the beautification project in *Bannon* was school-sponsored speech in a *nonpublic* forum, and the school had not solicited student's viewpoints. The project was simply intended to decorate the plain construction-barrier panels; and none of the murals included verbal messages, religious or otherwise, besides the few panels painted by Petitioner.

The *Rosenberger* Court, at page 830, directly based its reasoning on *Lamb's Chapel*, 508 U.S. at 393, which held that schools that open a limited public forum by allowing private community groups to use school facilities after hours should provide the facilities (for private, extra-curricular, after-school use) without regard to the group's religious perspective on permissible topics; it would be viewpoint discrimination to allow "all *views* about family issues and childrearing *except* those dealing with *[that] subject matter from a religious standpoint*" (emphasis added). By contrast, in *Bannon* there were no permissible topics to be discussed from a religious standpoint; the murals were simply intended for beautification of the panels, and Petitioner's murals were the only ones that included viewpoints. *Bannon*, 387 F.3d at 1211.

The Petition mischaracterizes *Rosenberger* as treating any exclusion of religious speech as viewpoint discrimination. However, *Rosenberger* itself recognized that "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify . . . reserving it for . . . certain topics." 515 U.S. at 829. *Rosenberger* plainly distinguished between subject-based restrictions and viewpoint discrimination:

> When the government targets *not subject matter, but particular views* taken by speakers *on a subject*, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the *specific motivating ideology or the opinion or perspective* of the speaker *is the rationale* for the restriction.

Id. at 829 (emphasis added). Thus, *Rosenberger* "merely held that refusing to fund only religious viewpoints on *otherwise-permissible subjects* (i.e. pregnancy or homosexuality) was viewpoint discrimination." *DiLoreto v.*

Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999) *cert. denied*, 529 U.S. 1067 (2000). The rationale for the restriction in *Bannon* was not to suppress any "specific motivating ideology." The principal only desired to restore order to the learning environment, avoid further disruptive controversy, and avoid an Establishment Clause violation.

In sum, the *Good News Club* Court specifically found a club was discussing the permissible (secular) subjects of "morals and character development . . . from a particular [religious] viewpoint." 533 U.S. at 111–12. The Court went on to emphasize that its holding in that case and in *Lamb's Chapel* and *Rosenberger* were all the same: that "speech discussing *otherwise permissible subjects* cannot be excluded from a *limited public forum* on the ground that the *subject* is discussed *from a religious viewpoint*." *Good News Club*, 533 U.S. at 111-12 (emphasis added). *Bannon* is consistent with those cases because all three of those decisions clearly distinguished between permissible subject-matter restrictions as opposed to invidious viewpoint-based discrimination against certain perspectives on an allowable subject.

Bannon is also wholly distinguishable from those cases, however, because they involved an intentional public forum (and extracurricular activities), rather than *Bannon's* curricular, scholastic nonpublic forum. Because the beautification project was not intended to be a forum for expression or debate of various viewpoints, Petitioner's painting proselytizing verbal messages amounted to "controvert[ing] the rules of a structured [school] activity with the intention of promoting an unsolicited message," *cf. Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271, 280 (3d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (as a means of sharing her faith—a conclusion supported by statements in the deposition. (SD 14, 17, 21, 64–65, 72–73, and 81–83.)) However, "a student's right to express [her] personal religious beliefs does not extend to using

the machinery of the state as a vehicle for converting [the] audience." *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999), *cert. granted and j. vacated*, 530 U.S. 1256 (2000), *op. reinstated*, 230 F.3d 1313, *cert. denied*, 533 U.S. 916 (2001).

E. The Editorial Control Was Based on Legitimate Pedagogical Concerns

This Court has held that "control over access to a nonpublic forum *can be based on subject matter* . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, (1985). "Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic." *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000). The principal in *Bannon* responded to an objective realization that the large, overt religious verbal messages and cross were of doubtful constitutional validity on a public school's walls and were causing a palpable disruption in the learning environment. Changing a few items (the words "God" and "Jesus" and the cross), was a narrowly-tailored way to render the religious messages non-sectarian and non-divisive. For example, "He has time for you" does not carry the sectarian impact of "Jesus has time for you."

The murals' potential for litigation and controversy was a valid concern justifying a response by the principal, especially given that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). In a case strikingly similar to *Bannon*, a school invited student clubs to paint murals in school hallways, but the principal

rejected certain designs, including a Latin cross and a swastika. The Seventh Circuit upheld the restrictions, noting that the principal's "reaction to the swastika, and to the naming of the brand of beer, in proposed secular murals shows that he was discriminating *not* against *religion* but merely against *displays*, religious or secular, *that lead to litigation or disorder*" or "might also require him to approve murals of a Satanic or neo-Nazi character, which would *cause an uproar.*" *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 466 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) (emphasis added).

Likewise, in *Bannon* the principal removed several kinds of symbols, both secular and religious, indicating that the principal was not discriminating against a Christian viewpoint, but rather against "displays . . . that lead to litigation and disorder." *See Gernetzke*, 274 F.3d at 466. Both the Satanic and Christian symbols were instances of the subject-content known as "proselytizing speech," which can be regulated more than other types of religious speech. *See Good News Club v. Milford Central School*, 533 U.S. 98, 130–34 (2001) (Stevens, J., dissenting); *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004).

Moreover, the project never was intended as a forum for expression or debate of various viewpoints about anything, much less politics or religion.

> Implicit in the concept of the *nonpublic forum* is the right to make distinctions in access on the basis of subject matter . . . . The touchstone for evaluating these distinctions is whether they are *reasonable in light of the purpose* which the forum at issue serves.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (emphasis added). In light of the

purpose of the project (artistic beautification in a nonpublic forum), the principal's concern with restoring the learning environment and avoiding an Establishment Clause violation was consistent with a reasonable and permissible content/subject-matter distinction.

F. *Bannon* Clearly Supports and Requires Viewpoint Neutrality

Petitioner's claim of conflict rests upon the unfounded factual argument that the principal engaged in invidious viewpoint discrimination against Petitioner's religious speech—a contention plainly rejected by the court below. *See Bannon*, 387 F.3d at 1216–17. Moreover, Petitioner mischaracterizes the holding of *Bannon* by claiming that "the Court of Appeals . . . h[eld] that this viewpoint discrimination was justified," and that the decision will be used "as justification for further acts of viewpoint discrimination." Pet. 19. Petitioner claims certiorari is needed to "make plain that viewpoint discrimination is prohibited . . . ." Pet. 11.

Yet, the *Bannon* decision itself expressly prohibits viewpoint discrimination: ". . . *Hazelwood* does not allow a school to censor school-sponsored speech *based on viewpoint*." *Id.* at 1215. This decision is consistent with the earlier holding in *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) ("Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on *viewpoint*."). Petitioner is patently wrong in claiming that "censor[ship] . . . because [of] the point of view . . . of [which] . . . individual officials disapprove" was "precisely th[e] kind of censorship that occurred in this case." Pet. 13. This allegation contradicts the evidence and the courts below.

Where, as here, a defendant asserts a content/subject-matter viewpoint-neutral basis for its

decision, the burden rests with the plaintiff to demonstrate that the asserted basis is a pretext for viewpoint discrimination. *See Mesa v. White*, 197 F.3d 1041, 1047–48 (10th Cir. 1999). However, Petitioner conceded that the principal had no invidious motive in removing any of the symbols or messages deemed offensive. (SD 101–104.) The Eleventh Circuit implicitly recognized that the record provides no evidence of pretext, correctly finding that the editorial control was validly subject-matter/content-based. Pet. App. A-31 (finding a "permissible exercise of control"); *Bannon*, 387 F.3d at 1216–17 (the school "restricted speech on basis of the content, not viewpoint," in order to cure the "disruption to the school's learning environment caused by [Petitioner's] murals" (and, the district court found, in order to avoid "endorsement of religious views." Pet. App. A-31.)).

Petitioner's bare assertions of discriminatory motive "do[ ] not suffice to allege impermissible viewpoint discrimination. Plaintiffs must identify the *particular subject matter* as to which expression is *permissible* . . ., but *as to which* plaintiffs' *viewpoint* has been wrongfully excluded." *East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City School Dist.*, 81 F.Supp.2d 1199, 1202 (D.Utah 1999). There is no record evidence to support the claim that the "rationale for the restriction" was "target[ing] *not subject* matter, but *particular views* taken by speakers *on a subject*," based on "the specific motivating ideology or the opinion or perspective of the speaker [on that subject]." *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) (citations omitted). Nor is there any evidence that the murals were intended for expression of viewpoints on any subject, much less potentially-divisive subjects such as politics or religion, which Petitioner admitted can be controversial. (SD 139–140).

The project's faculty sponsor, Mrs. Roberts, apparently had immediate concerns about the legality of

the paintings under the Establishment Clause, which she brought to the principal's attention the very evening of the painting; record evidence shows the principal and Mrs. Roberts were not personally opposed to the perspective of the messages; additionally, profanity, gang symbols, and all the overt religious speech—including Satanism—was removed, not only messages from a Christian perspective; and the principal had substantial pedagogical concerns about the disruption that had already begun to occur in the hallways and in the classrooms. The principal's editorial control was plainly viewpoint-neutral, as *Bannon* expressly requires.

G. This Court Recently Denied Certiorari in a Similar Case, Even Though It Expressly Allowed Viewpoint Discrimination

The Tenth Circuit recently decided a case similar to *Bannon*. *See Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003). Although the facts and results were similar, the rationale was different. *Bannon* plainly prohibits viewpoint-based discrimination against school-sponsored expression under *Hazelwood*, whereas *Fleming* expressly decided that *Hazelwood* allows viewpoint discrimination, based on language in *Hazelwood*:

> "A school must . . . retain . . . *neutrality on matters of political controversy*." *Hazelwood*, 484 U.S. at 272. No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. *Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint.

Fleming, 298 F.3d at 928 (some citations and internal quotes omitted, alteration and emphasis added). *Fleming*

also persuasively pointed out: "If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as 'God is Hate,' once it allows tiles that say 'God is Love.'" *Id.* at 934.

Given its authorization of viewpoint discrimination, *Fleming* was far more remarkable than *Bannon*. Yet this Court found *Fleming* to be unworthy of certiorari just two years ago; and it seems the Court should find *Bannon* even less interesting.

II. No "Split" Exists When the Circuits Have Unanimously Reached the Same Results under *Hazelwood* and this Court Has Denied Any Petitions for Certiorari

In the course of holding that schools may exercise substantial control over school-sponsored speech in a nonpublic forum under *Hazelwood*, six circuits have commented on whether viewpoint neutrality is required. On both sides of that question, many of these circuits have made their comments in dicta, nonessential to their holding, and all have held that the speech in question was properly restricted under *Hazelwood*.

First Circuit: Upheld a school's restriction on a teacher's speech regarding abortion and noted that *Hazelwood* "did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (citations omitted). *Ward* reasoned that "public schools may limit classroom speech to promote educational goals" due to the need, among others, "for public school officials to assure . . . 'that the views of the individual speaker are not erroneously attributed to the school'" (quoting *Hazelwood*, 484 U.S. at 271 (1988)).

Third Circuit: Upheld a school's right to limit a student's presentation of religious material in class and to move a student's poster with a religious theme, noting that "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns." *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172–73 (3d Cir. 1999), *aff'd on other grounds*, 226 F.3d 198 (3d Cir. 2000) (*en banc*), *cert. denied*, 533 U.S. 915 (2001).

Sixth Circuit: Upheld a university's control of student speech in yearbooks under *Hazelwood*, noting: "[I]f the school did not intentionally create a public forum, then the publication remains a nonpublic forum, and school officials may impose any reasonable, non-viewpoint-based restriction on student speech exhibited therein." *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999), *rev'd en banc on other grounds*, 236 F.3d 342 (6th Cir. 2001).[4]

Ninth Circuit: Upheld a school's refusal to publish family-planning ads in school publications as a permissible viewpoint-neutral subject-matter restriction under *Hazelwood*. *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991). The Ninth Circuit also upheld a school's declining to display religious speech on the ball field fence, allowing viewpoint-neutral content-based restrictions which "exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000).

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[4] The *en banc* court vacated the panel's decision and invalidated the university's control over the yearbook speech after finding a limited public forum instead of a nonpublic forum and deciding that *Hazelwood* did not apply to this extracurricular college-level activity.

Tenth Circuit: Upheld a restriction on religious speech on tiles to be affixed to the school walls, holding that *Hazelwood* did not require viewpoint neutrality. *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 928 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).

Eleventh Circuit: Allowed viewpoint-neutral content-based restrictions on denigrative anti-military political speech, noting: "*Hazelwood* involved a content based distinction. . . . There was no indication that the principal was motivated by a disagreement with the views expressed in the articles." *Searcey v. Harris*, 888 F.2d 1314, 1324–25 (11th Cir. 1989). However, "exhortative and denigrative presentations by speakers for the purpose of denouncing certain careers . . . may properly be banned" as content-based restrictions. *Id.* at 1326.

Where the various circuits have reached the same result of permitting restrictions on school-sponsored religious or political speech under *Hazelwood*, it matters little that some have followed different rationales. Further, in any of these cases in which a petition for certiorari was filed, this Court has denied each petition. There is no true "split" among the circuits when they reach the same results and, in many instances, cite each other for support.

III. THE ELEVENTH CIRCUIT COURT COULD HAVE AFFIRMED ON SEVERAL OTHER GROUNDS

The Eleventh Circuit affirmed the district court's judgment under *Hazelwood* because it was the most obvious basis for a decision. Neither court had occasion to reach the several other grounds upon which we believe the Eleventh Circuit would also have affirmed. These issues are summarized here to indicate the complications of the case and the likelihood that the district court's judgment would be affirmed in any event.

A. Disruption and Interference

Had the semi-permanent murals been purely private student speech that just happened to occur on school grounds, the commotion and disruption accompanying the displays should have justified the school's editorial control even under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (allowing a school to ban silent wearing of black armbands if administrators could reasonably forecast substantial disruption of, or material interference with, school activities or if there was any showing that disturbances or disorder actually occurred).

As shown in the Factual Background section above, in *Bannon* there was not only a reasonable forecast of disruption, but also actual disturbance and material interference with the learning environment. Although the Eleventh Circuit mentioned the disruption and commotion, it did not need to focus extensively on the disruption because the murals clearly were school-sponsored speech under the *Hazelwood* standard (rather than purely private speech just happening to occur on school grounds under *Tinker*)—and *Hazelwood* does not require a showing of substantial disruption; it only requires legitimate pedagogical concerns.

Even so, the commotion and disruption intensified the principal's pedagogical concerns. "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, . . . [t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 788 (1985). "In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ." *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). The Eleventh Circuit recognized that one of

the legitimate pedagogical goals was ending "the disruption to the school's learning environment caused by [Petitioner's] murals," and the editorial control was reasonably related to that goal "because it ended the disruption." *Bannon*, 387 F.3d at 1217. Had the speech been purely private expression just happening to occur on school grounds, such disruption certainly would have merited control under *Tinker*.[5]

B. Government Speech

The Eleventh Circuit could have affirmed on the broader basis of government speech. Where speech is not only school-sponsored but also becomes part of the construction walls for up to four years, the expression can properly be deemed government expression, over which the school has the right of full control. *See Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001) (upholding a school's refusal to post viewpoints contrary to speech on the school's bulletin board, which was government expression to which viewpoint analysis is inapplicable).

C. Establishment Clause Neutrality

The Establishment Clause requires the school to be neutral toward religion, between the various religions, and between religion and nonreligion. *See Epperson v.*

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[5] Additionally, the principal's editorial control would have been justified under *Scott v. School Bd. of Alachua County*, 324 F.3d 1246, 1247 (11th Cir. 2003), *cert. denied*, 540 U.S. 824 (2003) (upholding a ban on displaying the confederate flag, without reference to a forum analysis). School administrators "must have the *flexibility to control the tenor and contours of student speech* within school walls or *on school property*, even if such speech does *not* result in a reasonable fear of immediate disruption." *Id.* at 1247-48 (internal quotations omitted; emphasis added). Proselytizing sectarian speech—no less than controversial political symbols—can spur divisiveness and controversy that hinders the school's educational mission.

Arkansas, 393 U.S. 97, 103–04 (1968); *Engel v. Vitale*, 370 U.S. 421, 430–31 (1962).

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the [school] will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

Proselytizing speech affixed to the divider walls would be perceived by a captive audience as endorsed by the school. "No viewer could reasonably think that it occupies this location without the support and approval of the government." *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 599–600 (1989). *See also Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (a school's policy of permitting prayer at football games was unconstitutional where the activity took place during a school-sponsored event, which was not a public forum); *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) (a school district's refusal to allow students to deliver a sectarian prayer or a sectarian and proselytizing valedictory speech as part of a graduation ceremony was necessary to avoid violating the Establishment Clause); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 683–84 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095 (1995) (a portrait of Christ, donated to the school, in a hallway near the school office, had a proselytizing effect and failed the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Joki v. Board of Educ. of Schuylerville Cent. School Dist.*, 745 F.Supp. 823 (N.D.N.Y. 1990) (display of student's mural secured to the wall of the school auditorium as part of school decoration project, had the effect of conveying a message of government endorsement of Christianity and was prohibited by the Establishment Clause).

The school had a compelling governmental interest in avoiding violation of the Establishment Clause, justifying the minor content-based restriction on religious speech. "There is *no doubt* that compliance with the Establishment Clause *is* a state interest sufficiently compelling to justify content-based restrictions on speech" even in a traditional public forum. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) (emphasis added). *Accord Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 151 (2001).[6]

Incidentally, disclaimer signs could not sufficiently neutralize the captive student audience's perception of school endorsement; "no sign can disclaim an overwhelming message of endorsement." *County of Allegheny*, 492 U.S. at 619. *Accord Smith v. County of Albemarle, Va.*, 895 F.2d 953, 958 (4th Cir. 1990), *cert. denied*, 498 U.S. 823 (1990) ("It remains to be seen whether any disclaimer can eliminate the patent aura of government endorsement of religion."); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) ("[A] disclaimer of the obvious is of no significant effect.") (citation and internal quotations omitted). Further, where two faculty members had actually suggested or encouraged the proselytizing religious speech, a disclaimer of school involvement or endorsement could appear disingenuous.

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[6] Even a viewpoint-based restriction would have been justified by a compelling interest in avoiding violation of the Establishment Clause. "To discriminate 'against a particular *point of view* . . . would . . . flunk the test . . . [of] *Cornelius*, [but only] *provided that* the defendants have no defense based on the *establishment clause*.'" *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (quoting, with approval, *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (emphasis added)). *Accord Good News/Good Sports Club v. School Dist. of City of Ladue*, 28 F.3d 1501, 1508 n.13 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044, 1053 n.7 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004).

D. Qualified Immunity

As shown in detail in the Respondents' brief in the Eleventh Circuit, the legal landscape predating February, 2002, would have informed a reasonable principal that the editorial control was lawful. Moreover, the Eleventh Circuit's ruling in this case is an indication that a reasonable principal should have seen *Hazelwood* as authorizing the editorial control, because a principal cannot be held to a higher standard of understanding than the courts. *Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1274 (11th Cir. 2000). Thus, the principal would be entitled to qualified immunity and there would be no liability even if, merely *arguendo*, the editorial control had been unconstitutional.

E. The School Board's Non-Liability

An alternative basis for affirmance by the Eleventh Circuit would be that, under the circumstances of this case, the School Board could not be liable for money damages under 42 U.S.C. § 1983, even assuming unconstitutional actions by the principal. *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Denno v. School Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1276 and 1278 (11th Cir. 2000), *cert. denied*, 531 U.S. 958 (2000) (*Monell* allows entity liability for a school board "only if [the] constitutional torts result from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law"—conditions inapplicable in *Bannon*.).

IV. This Case Is Unique and Complex, Not Conducive to Certiorari Review

There are several factual and legal complications that would impede straightforward review. For instance:

the allegedly "student-initiated" expression on Petitioner's murals was suggested and/or encouraged by two faculty members (apparently not in compliance with School Board Policy 2.122, which requires employees to exhibit neutrality toward religion, nor with the Equal Access Act, which prohibits faculty monitors from participating in the club activities, 20 U.S.C. §§ 4071(c)(2)–4071(c)(5)); the supervising teacher and principal immediately and correctly became concerned that the semi-permanent, strategically-placed 8-foot by 8-foot murals, to be in place up to four years, would violate the Establishment Clause; the school required only minor changes to the messages; the principal clearly had no invidious discriminatory motive; and only Petitioner's murals contained verbal messages, while the other murals simply met the expectation of colorful artwork to beautify the drab construction panels; there was commotion and disruption of the learning environment, but the disruption ceased after the messages were edited. Accordingly, this case would be less than conducive to certiorari review.

CONCLUSION

The Eleventh Circuit thoughtfully reached the correct result in *Bannon*, consistent with decisions of this Court and the results in similar cases in other circuits. The petition for writ of certiorari should be denied.

Respectfully submitted,

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